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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1971**

**No. 71-79**

STATE OF NEW YORK,

*Petitioner,*

—v.—

JOSEPH MINICONE and JOHN MASSIELLO, JR.,

*Defendants-Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

This brief is submitted by the Respondents, above named, in opposition to the State of New York's petition for a Writ of Certiorari to review the determination of the New York Court of Appeals which unanimously reversed the Order of the Appellate Division, Second Department which affirmed the judgment of the County Court, Westchester County, convicting each of the respondents of the crimes of maiming and assault. The Court of Appeals also directed the dismissal of the indictments. (See Appendix of the petitioner's petition).

### Opinions Below

The opinion of the New York Court of Appeals is reprinted in 28 N.Y. 2d 279 (Appendix A of petitioner's petition).

The decision of the New York Supreme Court, Appellate Division, Second Department, is reported at 35 A.D. 2d 780. No opinion was written by the Second Department. The petitioner at page 1 of the Petition, states that the trial court rendered no written opinion. County Court Judge Beishem, Jr., did render an opinion however, and we assume that the petitioner will correct this error. The County Court Judge believed that delays to January 19, 1968 were in part caused by defense counsel's schedule and in part by the District Attorney with the "acquiescence" of the defendants' attorney. There is no factual support in the record that bolsters that conclusion. (64a)*

The County Court Judge had no explanation for the unexplained delay of 14 months between March 1968 and May 1969 and engages in some casuistry of taking "judicial notice" that new indictments were piling up faster than dispositions in 1968 and that Calendars were congested. There is no indication by the County Court Judge however, that any of this delay was attributable to the defendants.

## Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3).

## Question Presented

Whether the New York Court of Appeals was correct in dismissing the indictment and reversing the convictions of the respondents herein after finding that there was an

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* Numerals in parenthesis refer to pages of the Appellate Division record on appeal unless otherwise indicated.

inordinate delay of almost four years before the case was brought to trial? The trial itself did not occur until after a motion to dismiss for lack of speedy prosecution had been made on behalf of the respondents.

## Constitutional and Statutory Provisions

The Sixth Amendment is reprinted at page 2 of the petitioner's petition. Also §§ 8 and 668 Code Crim. Pro. and §12, Civil Rights Law.

Section 668, N.Y. Code of Criminal Procedure:

> "If a defendant, indicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found, the court may, on application of the defendant, order the indictment dismissed, unless good cause to the contrary be shown."

## Statement of the Case

While to some extent the statement of the case presented by the petitioner is accurate, there are certain aspects which are inaccurate. It is noteworthy that there was another defendant in the original indictment, namely, Saverio Minicone who had been severed from the case and pleaded guilty to the crime of manslaughter in connection with another indictment arising out of the same facts. The indictment herein was also taken into consideration at that time. At the trial, Saverio Minicone took the stand and exculpated the respondents herein completely from any complicity in the crime. He stated that Massiello not only was free from blame but was actively trying to prevent the crime from being committed.

An affidavit filed on behalf of the respondents by their attorney, Vincent W. Lanna, unequivocally declared:

> "... At no time during the past 3½ years, did the defense seek a postponement or consent, by implication or otherwise, to a postponement sought by the District Attorney or participate in any kind of dilatory activity which could in any way be interpreted as a waiver of its right". (49a, 61a).

It is also significant that there is no dispute that the trial of the within indictment was delayed "without good cause" for 45 months and 36 Terms of the County Court of Westchester County, or a total of 1,358 days between indictment and the commencement of the trial. In this petition, as well as in the courts below, the petitioner has resorted to matters outside the record. Conceding, *arguendo,* that there were many cases which were pending before the County Court and many indictments were being filed, the fact remains that the case against the respondents herein was one of the oldest cases on the entire Calendar in the County Court, considering both bail and prison cases as well.

The Court of Appeals in this case reviewed the facts and found that those facts had to be resolved in favor of the respondents herein.

It is respectfully submitted that the Court below was amply justified in finding that there had been an unconscionable and unconstitutional delay which warranted a reversal of the convictions and a dismissal of the indictment. The opinion of the Court of Appeals of New York is unanimous. The Court of Appeals, we understand, refused to amend its remittitur. The statutory requirements of the State of New York were violated. (See Sections 668 and 8 of the Code of Criminal Procedure and Sec. 12 of the Civil Rights Law).

## POINT I

**The petition for certiorari should be denied. The Court of Appeals of New York, interpreting New York statutory law found that there had been a denial of a speedy trial under the facts and circumstances of this case and ordered the judgment of conviction reversed and the indictments dismissed. The Court of Appeals is the highest judicial tribunal of the State of New York and since it has done nothing in derogation of the United States Constitution, this Court ought not disturb that determination. There is no basis for certiorari.**

The District Attorney of Westchester County is petitioning for certiorari in the belief that there is a Federal constitutional question which should be reviewed. The Sixth Amendment of the United States Constitution clearly orders that all courts, whether state or federal, must grant defendants a speedy trial in criminal cases. The State of New York has statutory law such as Sections 668 and 8 of the New York Code of Criminal Procedure and Section 12 of the Civil Rights Law, which also mandate a speedy trial. Those statutes are even more explicit than the Sixth Amendment.

The highest court of the State of New York has unanimously determined that under the standards for a speedy trial set forth under the statutes of the State of New York, the District Attorney of Westchester County has violated the rights of these respondents to speedy justice and has ordered a reversal and a dismissal of the indictment.

At this juncture, it is well to recognize that the District Attorney even now is attempting to flaunt, and to circumvent the mandate of the New York Court of Appeals because it has obtained a new indictment against these re-

spondents charging them with perjury for having denied their guilt at the trial. This charge of perjury, of course, was only returned after the New York Court of Appeals reversed the judgment of conviction, and then not for a number of weeks thereafter. The very fact that the District Attorney has seen fit to obtain an indictment for perjury which will necessarily require litigation of the very issues which already have been resolved in the case itself, and which the Court of Appeals has declared may not be the subject matter of a conviction, it is rather paradoxical that at the same time, the District Attorney should also be trying to upset that judgment of conviction below in this court.

It is respectfully submitted that the District Attorney is merely trying to circumvent the jurisdiction of the Court of Appeals and is also trying to harass the respondents in violation of the Eighth Amendment of the United States Constitution. (*Abbate* v. *United States*, 359 U.S. 187 and *People* v. *DeSisto*, 27 Misc. 2d 217).

In 1844, an English Judge dealing with a problem similar to that presented herein, opined very aptly in *Regina* v. *Robbins*, 1 Cox C.C. 114:

> "I ought not to allow the case to go further. It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? . . . If the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on trial."

The petitioner, of course, is arguing that the State incorrectly interpreted its own laws. Since this was in keeping with the spirit and letter of the Sixth Amendment, it is

difficult to understand how such an argument can be addressed to this court as a violation of constitutional right.

The opinion of the New York Court of Appeals reprinted in Appendix A at the end of petitioner's petition gives ample reasons for the reversal and the dismissal of the indictment. Not only is the Sixth Amendment guarantee to a speedy trial and such cases as *Klopfer* v. *North Carolina,* 386 U.S. 213 and others mentioned, but many state Court of Appeals' cases and other cases are cited. (*People* v. *Winfrey,* 20 N.Y. 2d 138; *People* v. *Wilson,* 8 N.Y. 2d 391; *People* v. *Masselli,* 13 N.Y. 2d 1, etc.).

The Court of Appeals declared that in a prior case, *People* v. *Bryant,* 12 N.Y. 2d 719, 720, it had held that even a two year delay without good cause shown must be deemed "*prima facie*" unreasonable.

Under the circumstances, it is respectfully submitted that the District Attorney of Westchester County presents no federal question to be reviewed, since no violation of any federal statute or constitution has been demonstrated to exist, but additionally, is really being frivolous in presenting this petition altogether.

## CONCLUSION

**The petition for certiorari should be denied.**

Respectfully submitted,

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